

REC'D TN
REGULATORY AUTH.
BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE
01 DEC 5 PM 1 21

IN RE:

COMPLAINT OF KMC TELECOM III,
INC. AND KMC TELECOM V, INC.

Against

UNITED TELEPHONE
SOUTHEAST, INC.

Docket No. 01-00964
OFFICE OF THE
EXECUTIVE SECRETARY

**RESPONSE OF KMC TELECOM III, INC. AND KMC TELECOM V, INC.
TO UNITED TELEPHONE SOUTHEAST, INC.'S
MOTION TO DISMISS AND
MOTION FOR MORE DEFINITE STATEMENT**

Complainants, KMC Telecom III, Inc. and KMC Telecom V, Inc. (hereinafter collectively "KMC"), hereby file this opposition to United Telephone Southeast, Inc.'s ("Sprint") motion to dismiss for failure to state a cause of action and motion for more definite statement. For the reasons set forth below, such motions should be denied.

BACKGROUND

This matter concerns the continuous and systematic illegal, discriminatory, and anti-competitive behavior of Sprint against KMC. As a barrier to KMC competing against Sprint in Tennessee, Sprint has engaged in the consistent provision of poor service to KMC, tactics of delay in the process of ordering, provisioning, maintenance and repair, and inappropriate contact with current and prospective KMC customers. KMC, through its complaint, seeks to eliminate such behavior on a going forward basis, and to obtain damages and/or fines against Sprint for past misconduct.

In response to KMC's complaint, Sprint has filed a motion to dismiss and a motion for more definite statement challenging the sufficiency of KMC's allegations. First, Sprint moves to

dismiss the allegations of paragraph 33 of KMC's complaint for failure to state a cause of action or failure to state a claim upon which relief can be granted. Paragraph 33 provides as follows:

In summary, Sprint has violated the Act, the Tennessee Code Annotated and the Interconnection Agreement to the acts set forth in paragraphs 12 through 32 of the complaint and through other acts as may be proven at the hearing of this matter.

As is clear from paragraph 33, the allegations set forth in paragraphs 12 through 32 form the basis that support the claims that Sprint has violated the Act, the Tennessee Code Annotated and the Interconnection Agreement. As set forth in those paragraphs, KMC alleges that Sprint has provisioned poor and discriminatory service, botched translations, missed appointments, prematurely disconnected KMC customers, failed to follow or implement escalation procedures, provisioned equipment with an inordinate amount of repeat troubles, and provided unnecessarily long ordering and provisioning repair intervals, among other actions, violating the provisions of the Act, the Tennessee Code Annotated and the Interconnection Agreement also noted in those paragraphs.

Sprint also complains of insufficient facts in paragraphs 10 through 17, 19 through 22, 24, 29, 30, 32, 33, and 35 of KMC's complaint. In these paragraphs, KMC alleges the following non-exclusive, pertinent facts concerning the defendant Sprint:

- (1) specific facts of damage to KMC's equipment in Sprint's offices (some damage of which Sprint acknowledges in paragraph 10 of its Answer), supportive facts regarding the knowledge and behavior of Sprint technicians;
- (2) poor service performance and quality, setting forth specific problems of botched translations, missed appointments, premature disconnects, and failed "coordinated" hot-cuts;
- (3) specific instances of KMC customers losing service due to Sprint's poor performance;
- (4) supportive examples of inadequate Sprint technician training and service; and
- (5) the failure to Sprint to timely respond to inquiries regarding troubles and provisioning.

Contrary to Sprint's assertions, KMC has set forth detailed factual and allegations giving Sprint clear notice as to the nature of KMC's claims.

LAW AND ARGUMENT

A. Motion to Dismiss for Failure to State a Cause of Action:

Sprint moves to dismiss the allegations in Paragraph 33 of KMC's complaint for failure to state a cause of action or failure to state a claim upon which relief can be granted. As stated above, Paragraphs 33 refers to and incorporates paragraphs 12 through 32 as a factual basis for KMC's claims that Sprint has violated the Act, the Tennessee Code Annotated, and the Interconnection Agreement. Also as stated above, paragraphs 12 through 32 set forth in detail specific illegal, discriminatory, and anti-competitive behavior of Sprint, including provisioning of poor and discriminatory service, botched translations, missed appointments, premature and unwanted disconnects of KMC customers, failure to follow or implement escalation procedures, provisioning of equipment with an inordinate amount of repeat troubles, and subjecting KMC to unnecessarily long ordering and provisioning repair intervals.

KMC's complaint, and the specific allegations therein, clearly notify Sprint of the nature of the facts sought to be proved. KMC should not be expected to know or set forth, if known, at this stage of the litigation every detail of the precise conduct of Sprint. The very nature of the wrongs committed in this case, discriminatory and anti-competitive behavior, suggest that many salient facts and perhaps causes of action or other legal theories remain, as of this time, undisclosed to KMC. Only through discovery can KMC ascertain the truth about relevant facts, the nature of any and all wrongful conduct, and the extent of Sprint's involvement in the wrongs against KMC. It is for this clear reason that KMC sets forth the allegation in Paragraph 33 of its complaint that it may prove Sprint's violation of the Act, the Tennessee Code Annotated, and the Interconnection Agreement through other acts as may be proven at the hearing of this matter. KMC should not be limited in its effort to address the wrongs against it as KMC progresses into discovery seeking additional evidence to support its claims.

When considering a motion for no cause of action, the facts set forth in the complaint are presumed to be true. *Doe v. Sundquist*, 2 S.W.3d 919 (Tenn. 1999); *Shipley v. Knoxville Journal*

Corp., 670 S.W.2d 222 (Tenn. App. 1984)¹ In its motion, Sprint fails to indicate why any of the factual allegations supporting the claims in paragraph 33 are insufficient to support a cause of action or fail to give Sprint notice of the claims against it. KMC believes the factual allegations are clearly sufficient and set forth the necessary detail to survive Sprint's motion. Accordingly, KMC requests the TRA to deny Sprint's motion to dismiss.

B. Motion for More Definite Statement:

TRA Rule 1220-1-2-.09(1)(c) states that a formal complaint must "set forth with specificity the factual basis and legal grounds upon which the complaint is based." The complaint is sufficient if it gives notice of the claim and the grounds upon which it rests.² KMC has not only set forth notice of the acts of Sprint for which it complains, it goes so far as to set forth specific examples of such behavior. Because Sprint's discriminatory and anti-competitive behavior has been continuous and systematic, it would be impossible for KMC to set forth every detail of every such act in its complaint. Nor is that required in a complaint. The allegations in the complaint need only adequately notify the defendant of the nature of the facts sought to be proved, enabling the defendant to generally prepare his defense.³

A defendant is not entitled through a motion for more definite statement to require exactitude and detail of pleadings beyond those necessary for this aim. In fact, some of the detailed facts omitted from a plaintiff's complaint may be those very facts that are within the defendant's possession, which must be obtained through discovery. The sustaining of an exception of vagueness and requiring of a more definite statement of facts should not act as the

¹ In the alternative, a motion to dismiss can be treated as a motion for a more definitive statement and complaining party can be ordered to serve a more definitive statement. Tennessee Practice, *Rules of Civil Procedure Annotated*, 3d ed., MacLean, Bonnyman. and Brandt, vol. 3, page 214, West Group. Also, even if a motion to dismiss is granted, the court ordinarily gives the plaintiff leave to amend the complaint to cure the defect. *Tennessee Dep't of Mental Health, Etc v. Hughes*, 531 S.W.2d 299, at 301 (Tenn. 1975).

² Tennessee Practice, *Rules of Civil Procedure Annotated*, 3rd ed., MacLean, Bonnyman. and Brandt, vol. 3, page 92, West Group.

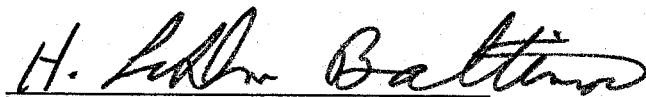
³ Petitioner need only state "the relief it seeks and the general factual basis for this relief." *Williamson County v. Twin Lawn Develop. Co., Inc.*, 498 S.W.2d 317, at 319 (Tenn. 1973).

equivalent to denying a plaintiff the opportunity to have its day in court to assert and enforce its rights.⁴ KMC is not required to detail in its complaint all of the evidence which it expects to advance in support of its claims.⁵

In any event, Sprint is not prejudiced by answering any of the paragraphs it cites in its motions. Sprint may admit or deny allegations or may answer that it is without knowledge or information sufficient to admit an allegation, which has the effect of a denial. Sprint has the opportunity through discovery to obtain further facts to prepare its defense.

In summary, KMC sets forth not only sufficient factual allegations to support its claims, it sets forth specific examples of Sprint's behavior. As both parties are provided discovery as a tool to seek additional factual information, Sprint's motions are nothing other than attempts to restrict KMC's claims, to delay the start of discovery, and to expand Rule 1220-1-2-.09(1) beyond its purpose. Accordingly, Sprint's motions should be denied.

Respectfully submitted,



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⁴ KMC believes it meets the requirements of the TRA Rules. Nevertheless, TRA Rules 1220-1-2-.09(2) allow the Authority to waive the provisions of Section .09(1) in order to prevent manifest injustice or hardship to the complaining party. Because there is no prejudice to Sprint as it can deny KMC's allegations, should the TRA find the allegations insufficient, it would request the TRA to waive the requirements of Section .09(1) to allow KMC to obtain additional facts surrounding its claims through the discovery process.

⁵ All that Tennessee Rules of Civil Procedure 8.01 requires is that a complaint contain a short, plain statement of a claim showing that the plaintiff is entitled to relief along with a claim of damage. *Adams v. Carter County Memorial Hospital*, 548 S.W.2d 307, 308-09 (Tenn. 1977); *Brown v. City of Manchester*, 722 S.W.2d 394, at 397 (Tenn. App. 1986).

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Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing has been mailed, postage prepaid, to the following, this 5th day of December, 2001.

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